No. 15-339

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In The

Supreme Court of the United States

MICHAEL ROSS,

Petitioner,

v.

SHAIDON BLAKE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Choosing not to address the question on which this Court granted certiorari, Mr. Blake's brief instead addresses a different question. Mr. Blake asks this Court to let stand the Fourth Circuit's erroneous adoption of a "reasonable belief" exception to the Prison Litigation Reform Act ("PLRA")'s requirement to exhaust administrative remedies, not because the PLRA allows for such an exception, but because, he contends, evidence not previously introduced in this case demonstrates that Mr. Blake should have prevailed on the alternative ground that no administrative remedies were available to him. For several reasons, this Court should decline.

1. Mr. Blake has effectively conceded that the PLRA does not allow for the Fourth Circuit's "reasonable belief" exception. The district court dismissed Mr. Blake's claim against Lt. Ross on the ground that Mr. Blake had failed to exhaust available administrative remedies. Pet. App. 56-61. The Fourth Circuit reversed on the ground that Mr. Blake did not need to exhaust because a hypothetical prisoner who had read the prison's regulations, directives, and handbook – something Mr. Blake admits he did not do – might have reasonably, though erroneously, believed that his request that the prison initiate an internal investigation was sufficient to exhaust administrative remedies. Pet. App. 12 n.4, 13-15. By declining to defend the grounds on which the Fourth Circuit ruled, Mr. Blake has effectively conceded that court's error.

2. Mr. Blake's proposed interpretation of when an administrative remedy is "available," and thus must be exhausted, lacks merit. Mr. Blake's contention that a remedy is not available if a hypothetical prisoner might have been confused as to procedure finds no support in the PLRA, its legislative history, or case law interpreting it. The cases from other circuits on which Mr. Blake relies stand for the unexceptional proposition that an administrative remedy is not "available" if a prison takes affirmative steps to block a prisoner from having access to it. There is no suggestion of similar conduct in this case. Maryland's administrative remedy procedures, with or without a pending investigation by the Internal Investigation Unit ("IIU"), were "available."

Indeed, Mr. Blake's proposed rule would create an even larger loophole in the PLRA than would the Fourth Circuit's "reasonable belief" exception, both because his rule abandons the "substantive purpose" prong of the Fourth Circuit's exception and because it effectively reinstates the pre-PLRA limitation that exhaustion was required only for remedies that courts found "plain." *See Booth v. Churner*, 532 U.S. 731, 739 (2001).

3. Mr. Blake's proposed alternative ground for relief is based on documents presented for the first time before this Court. Even if this were the proper forum for introducing such evidence – which it is not – the five anecdotal cases on which Mr. Blake relies, all of which focus on the first step of the administrative remedy process, do not support his claims that no

process was available. Moreover, we have located at least thirteen cases, including one of those mistakenly relied upon by Mr. Blake, in which prisoners received administrative hearings – and, in some cases, monetary compensation – by pursuing Maryland's administrative remedy procedures in cases involving IIU investigations.

I. As Respondent Effectively Concedes, the PLRA Does Not Allow for the Fourth Circuit's Reasonable Belief Exception.

1. Mr. Blake effectively concedes that the basis on which the Fourth Circuit ruled lacks support in the PLRA. Rather than defend the Fourth Circuit's reasonable belief exception, Mr. Blake argues that this Court should affirm on the alternative ground that he satisfied all available administrative remedies, Resp. Br. 13-30, 34-57, or dismiss this case as improvidently granted, *id.* 31-34. The closest Mr. Blake comes to defending the Fourth Circuit's rule is to claim that there is no "substantive difference" between the reasonable belief exception and his alternative focus on his novel interpretation of the word "available." Resp. Br. 41. However, elsewhere in his brief, Mr. Blake admits that the Fourth Circuit's rule is really an "extra-textual exception to the PLRA's exhaustion requirement," and he urges this Court to "resort to" the exception only if it does not adopt his "interpretation of the statutory term 'available.'" *Id.* 47-48 n.20.

Mr. Blake's attempt to recast the Fourth Circuit's reasonable belief exception as an examination of availability fails because the exception is necessarily premised on the existence of an available remedy. Pet. App. 10 (explaining that the exception addresses a prisoner's "reasonable, albeit flawed, attempt to comply with the relevant administrative procedures"). Stated differently, an exception to the requirement to exhaust "such administrative remedies as are available," 42 U.S.C. § 1997e(a), makes sense only if administrative remedies *are* available.

2. Mr. Blake's effort to conflate the Fourth Circuit's reasonable belief exception with his interpretation of the term "available" suffers from additional deficiencies. Under the PLRA, all "available" remedies must be exhausted, whether or not they meet federal standards or a court would find them "plain, speedy, and effective." *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth*, 532 U.S. at 739. Congress thus removed from courts the authority to decide whether a remedy is sufficiently "plain" to warrant exhaustion. Pet'r Br. 2-6, 35-44. Regardless of how it is articulated, a rule that allows a prisoner to bypass administrative remedies because a hypothetical, "objectively reasonable prisoner" might misunderstand them, Resp. Br. 35, necessarily conflicts with the clear congressional purpose in making those changes, *see* Pet'r Br. 35-44. Because Mr. Blake's proposed definition of "available" would eviscerate that congressional intent, it must be rejected.

This Court has suggested that exhaustion might not be required where a prison creates "procedural requirements for the purpose of tripping up all but the most skillful prisoners," *Woodford v. Ngo*, 548 U.S. 81, 102-03 (2006), but there is no evidence of that in Maryland's administrative remedy procedures. The possibility that *Woodford* left open is a far cry from both Mr. Blake's proposal and the Fourth Circuit's detailed parsing of Maryland regulations, the prison directives, and the handbook. If this Court is to ascribe meaning, as it must, to Congress's deletion of the requirement that prisoners need exhaust only those remedies that the courts find "plain" and "effective," then it must preclude this level of judicial involvement in, and scrutiny of, a prison's available administrative remedy procedures. *Nyhuis v. Reno*, 204 F.3d 65, 74 (3d Cir. 2000) (stating that elimination of these terms was intended to relieve courts of obligation to evaluate relative merits of prison system's available remedies).

This is not to say that prisons may create requirements to prevent inmates from accessing a remedy. Contrary to Mr. Blake's assertion, Maryland does not argue that a "court can *never* consider whether a prison has adopted administrative procedures that are indecipherable." Resp. Br. 2. But the Fourth Circuit's parsing of Maryland's procedures to seek out any possible basis for confusion on the part of a hypothetical reasonable prisoner differs considerably from asking whether available procedures are "indecipherable." Maryland's procedures and practices are

not close to indecipherable; indeed, as explained below, many inmates alleging improper use of force have used those same procedures in cases involving IIU investigations.

4. The Fourth Circuit erroneously adopted an "objective" standard of "reasonable belief," under which it treats the prisoner's actual belief and knowledge as irrelevant. This exception even excuses an inmate who, like Mr. Blake, deliberately bypasses the prison's administrative remedy procedures. Pet. App. 12 n.4. That standard undermines the centerpiece of the PLRA and is inconsistent with rulings from other circuits and with the very concept of reasonable belief. "As the term itself indicates, reasonable belief" should "involve[ ] both a subjective component and an objective component." *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015); *accord Allen v. Admin. Review Bd.*, 514 F.3d 468, 477 (5th Cir. 2008). Even when prison officials make threats to prevent filing of a grievance, courts still consider the actual state of mind or conduct of an inmate. Thus, to be excused from a failure to exhaust, the inmate must establish "both" that (1) he was actually "deter[red] from lodging a grievance or pursuing a particular part of the process"; and (2) under the circumstances, "a reasonable inmate of ordinary firmness and fortitude" would have been so deterred. *Turner v. Burnside*, 541 F.3d 1077, 1085

(11th Cir. 2008); *accord Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011).[1]

In reality, Mr. Blake was not actually confused about whether he needed to exhaust administrative remedies, as he never had any intention of doing so. Both on the day of the incident and a year later, Mr. Blake explicitly disclaimed any intent to go any further with his complaint. J.A. 172, 195, 229-30, 263-65, Pet. App. 24. That type of deliberate choice to "bypass" the administrative process, *Woodford*, 548 U.S. at 102, and then later to bring a claim in court, "is precisely what the PLRA was designed to protect against," *Napier v. Laurel Cnty.*, 636 F.3d 218, 225 (6th Cir. 2011).

Similarly, Mr. Blake was not actually confused by the administrative remedy procedures because he never read them. J.A. 174. Although Mr. Blake asks this Court to ignore this inconvenient fact on the ground that his proposed test is objective, Resp. Br.

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[1] Similarly, where an alleged mistake of fact or law is interposed either as a defense or to excuse the performance of a duty, the law requires *both* (1) an actual mistake *and* (2) a showing that the mistake was objectively reasonable. *See* 1 W. LaFave, *Substantive Criminal Law* § 5.6(a) (2d ed. 2014); *United States v. Martin*, 753 F.3d 485, 493 (4th Cir. 2014) (mistake of fact requires both actual and reasonable belief); *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997) (same). Respondent, in advocating an objective standard that ignores the prisoner's actual state of mind, relies on inapposite precedents involving objective standards established to define duties, guide conduct, or impose liability. Resp. Br. 37.

54-55, this Court should reject his plea. Allowing prisoners to deliberately bypass a prison's remedies is directly contrary to the purposes of the PLRA. *Woodford*, 548 U.S. at 102.

II. THE COURT DID NOT GRANT CERTIORARI TO DETERMINE THE MEANING OF "AVAILABLE" UNDER THE PLRA.

1. Until now, Mr. Blake's argument regarding the availability of administrative remedies was based on the assertion that, contrary to the Department's applicable directives and regulations, he was not required to exhaust *any* administrative remedy because he had requested and cooperated with an IIU investigation. Not until his merits brief to this Court did he attempt to adduce factual support purporting to show that the Department's administrative remedy procedures were not functionally available to him.

Mr. Blake's belated presentation of such information in this Court is particularly inappropriate given the burden of proof that was his responsibility to satisfy in the district court. Courts of appeals have held that, although the defendant has the initial burden to prove that administrative remedies are generally available, the burden then shifts to the plaintiff to show that the remedies were nonetheless effectively unavailable to him. *See, e.g.*, *Hubbs v. Suffolk Cnty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015) (once defendants meet initial burden, plaintiff may demonstrate that other factors rendered nominally available

procedure "unavailable as a matter of fact"); *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) ("[T]he burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him."); *Tuckel*, 660 F.3d at 1254 (once defendant proves that plaintiff failed to exhaust, "onus falls on the plaintiff to show that remedies were unavailable to him as a result of intimidation by prison officials"). Having failed to produce evidence to meet this burden below, Mr. Blake is not permitted to do so for the first time in this Court.

The district court determined that Mr. Blake had an available administrative remedy, Pet. App. 40-42, and that Mr. Blake's "only proffered excuse" for failing to exhaust was "his subjective belief" that the IIU investigation "relieved him from this requirement," Pet. App. 41. The Fourth Circuit did not disagree with the district court's conclusion that Mr. Blake had an available remedy, but determined nonetheless that exhaustion was excused because he reasonably could have believed that the IIU investigation satisfied the requirement. Pet. App. 2-3, 14-15. That holding is the question that this Court granted certiorari to address.

Mr. Blake's late-raised functional unavailability claims are not properly before this Court. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (this Court does not, as a general rule, decide issues outside the questions presented by the petition for certiorari). In

his Brief in Opposition, Mr. Blake presented three issues: (1) whether Lt. Ross had waived the defense of failure to exhaust available administrative remedies; (2) whether Mr. Blake had exhausted by "triggering" an internal investigation; and (3) whether, even if he did not properly exhaust, he satisfied the PLRA by causing an investigation that fulfilled the PLRA's substantive purposes. Br. Opp. i.

Mr. Blake did not present any issue regarding *actual* unavailability of an administrative remedy to a prisoner in his circumstances, *id.*, and he contended only that "[his] IIU complaint *did* satisfy his exhaustion obligation as a matter of Maryland law," or, alternatively, that Lt. Ross had failed to prove that it did not. Br. Opp. 14. The Court should reject Mr. Blake's attempt to pose and answer a question that differs significantly from the issues identified in the petition and his brief in opposition. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011) (Court does "not normally consider a separate legal question not raised in the certiorari briefs") (citing Sup. Ct. Rule 15.2).

2. In his newly-raised argument on the meaning of "availability," Mr. Blake relies on inapposite PLRA cases in which courts excused failed attempts to exhaust where prison officials actively interfered with attempts to use the available process.[2] *See, e.g.*,

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[2] "Most reported cases excusing compliance with a grievance system consider situations where an inmate was prevented

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Dillon v. Rogers, 596 F.3d 260 (5th Cir. 2010) (officials made incorrect and unverifiable statements about procedures); *Goebert v. Lee Cnty.*, 510 F.3d 1312 (11th Cir. 2007) (officials hid appeal procedures from inmates); *Dole v. Chandler*, 438 F.3d 804 (7th Cir. 2006) (officials misplaced inmate's timely complaint); *Brown v. Croak*, 312 F.3d 109 (3d Cir. 2002) (officials actively thwarted efforts to exhaust); *cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) (habeas exhaustion "rules reflect an equitable judgment that only where a prisoner is impeded or obstructed will a federal habeas court excuse the prisoner from the usual sanction of default"). The circumstances here differ from those cases in two critical and decisive respects, because there is no evidence that Mr. Blake ever attempted to exhaust and no suggestion that officials interfered with any such attempt.

Mr. Blake also relies on cases that he claims excused a habeas petitioner's failure to exhaust a state court remedy that was so bewildering as to be effectively unavailable. Resp. Br. 45. However, in those cases, the petitioner had made a good faith effort to exhaust state remedies and the Court deemed that pursuing such efforts further would be futile. *See Wilwording v. Swenson*, 404 U.S. 249, 249-50 (1971) (citing *Marino v. Ragen*, 332 U.S. 561 (1947)

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from grieving by affirmative action." *Graham v. County of Gloucester*, 668 F. Supp. 2d 734, 738 (E.D. Va. 2009) (citing cases), *aff'd sub nom. Graham v. Gentry*, 413 F. App'x 660 (4th Cir. 2011).

(Rutledge, J., concurring)). Indeed, this Court has interpreted *Wilwording* as essentially establishing a futility exception to habeas exhaustion. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (citing *Wilwording*, 404 U.S. at 250). In light of the PLRA's distinct statutory language and history, however, this Court has already decided that futility is not a valid exception under the PLRA. *Booth*, 532 U.S. at 739, 741 n.6.

Even if there were some ambiguity in Maryland's procedures, that ambiguity would not excuse an inmate from at least trying to exhaust. When a grievance policy "is silent or vague in a particular circumstance, courts must look to see whether the prisoner has attempted to satisfy the requirements of the policy," and a prisoner must make "some affirmative efforts to comply with the administrative procedures." *Napier*, 636 F.3d at 223; *see also Lee v. Willey*, 789 F.3d 673, 677 (6th Cir. 2015); *Ruggiero v. County of Orange*, 467 F.3d 170, 178 (2d Cir. 2006); *Albino v. Baca*, 697 F.3d 1023, 1035 (9th Cir. 2012), *overturned on reh'g en banc on other grounds*, 747 F.3d 1162 (9th Cir 2014) (summarizing cases requiring "a good faith effort on the part of inmates to exhaust a prison's administrative remedies as a prerequisite to finding remedies effectively unavailable").

"An inmate's subjective belief that the procedures were not applicable to [his kind of grievance] 'does not matter' and is not determinative." *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005) (citation omitted). Instead, "[t]he only way to determine if the process

[is] available [is] to try." *Napier*, 636 F.3d at 224 (quotation omitted). But Mr. Blake did not try to use the prison's remedy procedures. *See* Pet'r Br. 8-9, 54 (explaining that an IIU investigation is not an administrative remedy procedure under Maryland law and does not serve the same purposes).

3. Similarly unavailing is Mr. Blake's reliance on habeas and administrative exhaustion case law to support his broad interpretation of "available." A habeas applicant must first exhaust "the remedies available in the courts of the State" before he or she is eligible for habeas relief. 28 U.S.C. § 2254. Most of the habeas cases cited by Mr. Blake stand merely for the principle that an inmate need not file "repetitious applications" if the inmate has already presented his claims once through the entire state court system. *Wilwording*, 404 U.S. at 250 (quoting *Brown v. Allen*, 344 U.S. 443, 449 n.3 (1953)). Thus, habeas exhaustion requires only "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that prisoner who fails to seek discretionary review in state's highest court has failed to exhaust).

These cases do not excuse an inmate from trying to press his or her claims through the entire course of an available remedial procedure; to the contrary, they require exhaustion of "one complete round." *Id.* The PLRA requires exhaustion of "all steps that the agency holds out," *Woodford*, 548 U.S. at 91 (quotation omitted), which necessarily must include any

available appeals. In this case, Mr. Blake never initiated a claim for a remedy, pursued an appeal to the Commissioner, or submitted a claim to the Inmate Grievance Office. Thus, even if these habeas principles were to apply, they would not help Mr. Blake.

4. With respect to administrative exhaustion doctrine, Mr. Blake's argument is deficient for reasons addressed more fully in Lt. Ross's opening brief, none of which Mr. Blake addresses. Pet'r Br. 45-49. Mr. Blake's reliance on *Bowen v. City of New York*, 476 U.S. 467 (1986), reflects a misunderstanding of that case. In *Bowen*, a class of plaintiffs challenged a federal policy that had the effect of denying disability benefits. *Id.* at 469. This Court held that a subset of class members, who were not even aware of the existence of the injurious policy, should not be held to the exhaustion requirement. *Id.* at 482. In claiming support from *Bowen*, however, Mr. Blake confuses the class members' knowledge of the underlying policy, which was the issue in *Bowen*, with knowledge of the procedures in place for seeking a remedy, which is the issue here. Resp. Br. 47. Because Mr. Blake has never claimed that he was unable to complain due to unawareness of his injury, he lacks the ignorance of injury that made failure to exhaust excusable in *Bowen*.[3]

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[3] Similarly mistaken is Mr. Blake's contention, relying on a different part of *Bowen*, that cases involving an exception to administrative exhaustion requirements for "undue prejudice" or "hardship" compel the conclusion that exhaustion is not required

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III. Respondent's Newly Discovered Evidence Regarding "Availability" Is Inappropriate and Inaccurate.

A. The Court Should Decline to Consider Mr. Blake's Newly-Presented Evidence.

Before this Court, Mr. Blake seeks to introduce, for the first time, factual support for his contention that, in 2007, the existence of an IIU investigation precluded all administrative remedies. The district court and the Fourth Circuit relied on the evidence in the record, including applicable regulations, to identify available administrative remedies. Pet. App. 7-8, 11-15, 38-39, 40-42, 56-58. Indeed, the Fourth Circuit's "reasonable belief" exception presupposes the existence of an available remedy. Mr. Blake never introduced contrary evidence below, but now claims that anecdotal records from five cases establish "conclusively" that Maryland prison officials interpreted Maryland regulations to preclude any administrative remedies while an IIU investigation was

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where a remedy may be confusing. Resp. Br. 47; *see also* Resp. Br. 47-48 n.20 (asserting that *Bowen* held that certain litigants need not exhaust administrative remedies if doing so would lead to "irreparable harm"). That is a non sequitur. *Bowen* does not give the federal courts leave to craft ad hoc, equitable exceptions to this exhaustion requirement. Unlike the statutory scheme at issue in *Bowen*, Congress's deletion of the prior "interests of justice" requirement under the pre-PLRA scheme shows that Congress did not intend to allow such exceptions in the PLRA. In any event, there has never been any suggestion of irreparable harm to Mr. Blake if he were to have properly exhausted his administrative remedies.

pending. Resp. Br. 19-26. This Court should decline Mr. Blake's attempts to insulate the Fourth Circuit's legal error from review.

Mr. Blake had an opportunity in the district court to conduct discovery and offer evidence, and he did so. Based on the resulting summary judgment record, the district court determined that administrative remedies were both factually and legally available. Pet. App. 40-42, 56-60. Mr. Blake improperly attempts to reopen that record on appeal. This Court does not consider non-record evidence or resolve new factual disputes. As this Court has long held, appellate courts "can act on no evidence which was not before the court below." *Boone v. Chiles*, 35 U.S. 177, 208 (1836); *see also Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986) (emphasizing that appellate court "must affirm or reverse upon the case as it appears in the record").

This Court does not "address for the first time" an issue "which the Court of Appeals has not addressed." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). Nor does it "consider claims that have not been the subject of factual development in earlier proceedings." *Witters*, 474 U.S. at 486 n.3. Thus, this Court should refuse Mr. Blake's invitation to newly determine as a factual matter whether, despite the legal availability of administrative remedies, remedies were functionally unavailable.

B. The Evidence Establishes that an Administrative Remedy Was Available.

Even if this Court were to accept Mr. Blake's invitation to go outside the record, public records confirm that inmates were able to pursue administrative remedies notwithstanding an IIU investigation. Mr. Blake's anecdotal evidence is unavailing both because it does not establish what he claims and because it fails to account for other cases that demonstrate that administrative remedies were available.

In relying on five[4] anecdotal cases as "conclusive" evidence regarding Maryland practice, Mr. Blake errs in at least three ways. First, such anecdotal evidence cannot serve as conclusive evidence of a statewide practice. Second, in focusing on the first stage of a three-stage administrative remedy process, Mr. Blake ignores the broader scope of the available administrative process. Third, his "evidence" disregards a number of cases involving IIU investigations where claims for administrative remedies were presented and successfully pursued.

1. Five individual cases handled at a low level in the Department do not constitute Maryland law. This "anecdotal evidence" is "too weak" to prove that

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[4] Mr. Blake also discusses a number of district court cases, all of which were decided under a different set of directives that went into effect after the events underlying this case. *See* cases cited at Resp. Br. 23 n.9, 27, 28 n.11, 29 nn.12 & 13. None of these cases discuss any pertinent provisions or contain relevant legal analysis. *See* Pet. App. 59-61.

administrative remedies were not available. *Cf.* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, ___, 131 S. Ct. 2541, 2556 (2011) (rejecting reliance on limited anecdotal evidence to prove a larger pattern or practice). Such "anecdotal evidence rarely, if ever, can show a systemic pattern." *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992) (quoting *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991)). At most, Mr. Blake's new evidence indicates that some wardens dismissed initial requests for administrative remedies while an IIU investigation was pending. But the warden was only the first step in the process, and a dismissal of an individual grievance does not establish state law.

2. In focusing exclusively on the initial phase of the process, Mr. Blake ignores the broader context of the administrative remedies that were available to him.

The Inmate Grievance Office was created in 1971 to hear inmates' complaints; it provides the primary administrative remedy for *any* inmate grievance against a correctional officer. *McCullough v. Wittner*, 314 Md. 602, 610 (1989); COMAR § 12.07.01.02B(7) (1994) (defining grievance broadly as "the complaint of any individual in the custody of the Commissioner" arising from "the circumstances of custody or confinement"). If the complaint involves an assault by a correctional officer, the inmate must first exhaust the ARP process as condition precedent to review of his grievance by the Office. This is done by submitting a complaint to the warden, then appealing an adverse

decision to the Commissioner. Md. Code Ann., Corr. Servs. § 10-206(b); Pet. App. 77-78, J.A. 325-26, 368-69. Within 30 days of the Commissioner's decision, the inmate may submit a complaint to the Inmate Grievance Office.

As the directives provide, a procedural dismissal of an ARP complaint is a "substantive decision," to be appealed to the Commissioner and then submitted to the Inmate Grievance Office. J.A. 325-26, 368-69. Such a dismissal and Commissioner's affirmance thus exhaust the ARP process. The procedural dismissals in the five cases identified by Mr. Blake should therefore have been appealed, and then submitted to the Inmate Grievance Office. As shown below, at least one of them was.

Alternatively, if the ARP is not available for a class of grievance, inmates are entitled to submit a grievance directly to the Inmate Grievance Office. As Judge Williams explained, Maryland law "vests primary responsibility for fielding inmate grievances with the" Office, Pet. App. 58, and inmates thus could "file a grievance directly with" that office. Pet. App. 56. *See* Md. Code Ann., Corr. Servs. § 10-206(a); *McCullough*, 314 Md. at 610 (submission of complaint to Office is inmates' primary administrative remedy).

Contrary to Mr. Blake's insinuations, this was not kept secret. The handbook explained that the only complaints that the Inmate Grievance Office would not accept initially were those "that can be handled through the ARP"; for those complaints, the Office

would accept them after the inmate had "filed a [complaint] with the warden and appealed to the Commissioner." Pet. App. 78. As Judge Williams concluded, there was "very little, if any, ambiguity in Maryland's inmate grievance procedures." Pet. App. 42.

Moreover, these procedures were not designed as a trap for the unwary. An inmate who mistakenly submitted an ARP-eligible claim to the Inmate Grievance Office would be told to proceed with the ARP process and, in such a case, normal ARP time limits were "set aside." J.A. 315. Whether through the appeals in the ARP process or directly, an inmate who properly exhausted either process would thus reach the Inmate Grievance Office, which unquestionably has authority to hear grievances despite an IIU investigation. Pet. App. 58-59; *see McCullough*, 314 Md. at 610. As Judge Williams recognized, the IIU regulations "expressly contemplate the contemporaneous conduct of IIU and IGO proceedings." Pet. App. 59 (citing COMAR § 12.11.01.05B).

The only purported authority that Mr. Blake cites for his contrary view is an IIU regulation that requires agency heads to "[r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head that is subsequently assumed by the IIU." Resp. Br. 16-17 (citing COMAR § 12.11.01.08B). Mr. Blake never raised that regulation below, and the Fourth Circuit never relied on it, for good reason. The regulation is not part of the provisions governing administrative

remedies and is not referenced in any of the materials provided to prisoners describing the remedy process. Moreover, the IIU regulation applies only to investigations over which the IIU has authority, namely, criminal and serious misconduct investigations for the purpose of determining whether to take disciplinary action or file criminal charges. *See* Md. Code Ann., Corr. Servs. § 10-701(a)(3). The regulation does not apply to administrative remedy procedures to redress a prisoner's grievance.[5]

More to the point, even assuming the regulation were a legislative regulation that required a warden to dismiss an ARP complaint, which it is not, the regulation could not preclude the Inmate Grievance Office from considering a prisoner's claim. An inmate's complaint alleging assault by a correctional officer is "a matter falling within [its] expertise," and exhaustion of that process is a prerequisite to filing a civil action in Maryland state court. *McCullough*, 314 Md. at 610; Md. Code Ann., Cts. & Jud. Proc. §§ 5-1001(c), 5-1003. Moreover, the Inmate Grievance Office's remedy procedure involves an adversarial hearing before an independent administrative judge, not a criminal or misconduct "investigation." Pet. App. 79-80.

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[5] Moreover, COMAR § 12.11.01.08 is an "interpretive" regulation that lacks the force of law and cannot diminish the scope of a prisoner's available administrative remedies. *Building Materials Corp. v. Board of Educ.*, 428 Md. 572, 591 (2012).

3. Mr. Blake now claims, based on five anecdotal cases, that the ARP process was not available in practice during the pendency of an IIU investigation, Resp. Br. 19-23; and, based solely on one anecdotal case, that a direct complaint with the Inmate Grievance Office was also not available, Resp. Br. 25-26. He is incorrect.

Mr. Blake claims that an "exhaustive" search of district court records to identify cases involving both IIU investigations and inmate grievances did not reveal a single case in which the grievance was allowed to proceed. Resp. Br. 18. However, a contrary conclusion emerges from a quick examination of just the cases on which Mr. Blake relies. Although Mr. Blake is correct that the initial ARP claim filed by Austin Gladhill was procedurally dismissed by the warden, Mr. Gladhill appealed that procedural dismissal to the Inmate Grievance Office, which held a hearing on the merits of his complaint as the law requires, Md. Code Ann., Corr. Servs. § 10-207 (Office must hold hearing unless complaint wholly lacks merit on its face). Pet'r Lodging 1-10, 14-16. Mr. Blake's proposed lodging of an excerpt of the Gladhill documents omits the discussion of the role of the Inmate Grievance Office in the case.[6]

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[6] Mr. Blake also errs in relying on Mr. Wilkerson's case as the sole pre-2008 support for his claim that the Inmate Grievance Office would not hear a complaint for which the ARP process was not available. Resp. Br. 25-27. One example cannot establish this purported practice and, in any event, Mr. Blake

(Continued on following page)

Mr. Gladhill's experience is not unique. Lt. Ross has identified at least twelve other cases in which the underlying events occurred before August 2008 and where the Inmate Grievance held a hearing on the merits of a claim when there had been an IIU investigation.[7] Moreover, although just the existence of hearings in these cases disproves Mr. Blake's claim, eight of these inmates received monetary compensation, in amounts that ranged up to

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mischaracterizes the facts of Mr. Wilkerson's case. Mr. Blake claims that when Mr. Wilkerson filed a grievance with the Inmate Grievance Office, his ARP had already been dismissed. Resp. Br. 26. In reality, Mr. Wilkerson had not yet filed an ARP, and there is no evidence that he explained why he was filing the grievance without exhausting the ARP process. Resp. Lodging 18-19. It thus appears that the Inmate Grievance Office had no grounds to believe an IIU investigation was pending or that the ARP would be dismissed. Even if the Inmate Grievance Office had known that an IIU investigation was pending, its decision to require exhaustion of the ARP would show no more than the expectation of the proper process; an inmate must generally exhaust the ARP, including all appeals, before reaching the office.

[7] In each of these cases, the administrative law judge issued a post-hearing proposed decision on a prisoner's grievance that notes the existence of an IIU investigation. Pet'r Lodging 87, 93, 113, 123, 133, 145, 151, 160, 170, 181, 193, 203, 207, 214, 226. To take just one example, on June 7, 2005, Eric Gwynn appealed the procedural dismissal of his ARP complaint to the Inmate Grievance Office, which set the grievance for a hearing even though there had been an IIU investigation. Pet'r Lodging 93. Given the age of the relevant proceedings, and the lack of any systematic means of tracking such overlapping proceedings, it is likely that there were other similar cases that have not yet been identified.

$100,000.[8] Pet'r Lodging 245-63. Notwithstanding Mr. Blake's professed confusion over regulations he never read, these examples show that meaningful administrative remedies were available and could be successfully pursued under the pre-August 2008 prison directives.[9]

4. That these inmates had their administrative remedy claims presented to the Inmate Grievance Office and heard by an administrative law judge demonstrates that the remedy procedures offered by Maryland were in fact available. Even if Mr. Blake's

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[8] In one of the cases, Kenneth Davis filed an ARP alleging that he had been assaulted by prison staff. Pet'r Lodging 231. Although he claimed that he was told not to file an ARP because an IIU investigation was pending, he followed the prescribed procedures, appealed the procedural dismissal to the Inmate Grievance Office, and received a hearing after which the administrative law judge recommended an award in favor of Davis. Pet'r Lodging 231, 243. The Department and Mr. Davis settled his claim for $100,000. Pet'r Lodging 263. Similarly, the Department settled the seven other cases for monetary awards after an administrative law judge had recommended compensation. Pet'r Lodging 245-63.

[9] As Judge Williams recognized, the same is true under the 2008 amendments. Pet. App. 57-58. Mr. Blake's purportedly "exhaustive" search failed to turn up at least three examples under the 2008 directives where inmates received an Inmate Grievance Office hearing notwithstanding an IIU investigation. Pet'r Lodging 17-24, 32, 37, 39-44, 58-63, 72 (*Dunn v. Parsons*, No. 8:11-cv-01960, Dkt. No. 24-17, Ex. 13 (Nov. 11, 2011); *Diggs v. Balogan*, 8:15-cv-00535, Dkt. No. 1 (D. Md. Feb. 24, 2015); *Brightwell v. Hershberger*, 11-cv-3278, Dkt. No. 141-2, Exs. 3 & 4 (D. Md. Oct 23, 2015)). Mr. Diggs received monetary compensation. Pet'r Lodging 45-46, 53-54.

"reasonable inmate" standard were correct, it was met. Moreover, a *reasonable* inmate in Mr. Blake's position would have attempted to pursue a remedy. Mr. Blake did not, and cannot argue now that his failure to exhaust should be excused because some other hypothetical, diligent prisoner might have been confused. This Court should not rely on his counter-factual and self-serving claims that he surely would have been confused by the procedures if only he had read them.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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Title 12
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Subtitle 07 INMATE GRIEVANCE OFFICE

Chapter 01 General Regulations

Authority: Correctional Services Article, §10-204, Annotated Code of Maryland

* * *

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Administrative remedy procedure" means the procedure established by the Commissioner for inmate complaint resolution.

(2) "Commissioner" means the Maryland Commissioner of Correction.

(3) "Disciplinary proceeding" means Division of Correction adjustment proceedings and Patuxent Institution disciplinary proceedings.

(4) "Division" means the Maryland Division of Correction.

(5) "Executive Director" means the Executive Director of the Inmate Grievance Office or designee.

(6) "Fair value" means the value of inmate property at the time of the loss, damage, or theft that is the lesser of the:

(a) Actual cost of the property at the time of acquisition, less any amounts attributable to depreciation, wear, use, and other factors which decrease the value of the property; or

(b) Reasonable cost of the property at the time of acquisition, less any amounts attributable to depreciation, wear, use, and other factors which decrease the value of the property.

(7) "Grievance" means the complaint of any individual in the custody of the Commissioner or confined to the Patuxent Institution against any officials or employees of the Division or the Patuxent Institution arising from the circumstances of custody or confinement.

(8) "Grievant" means an inmate in the custody of the Commissioner or confined to the Patuxent Institution who files a grievance with the Office.

(9) "Maryland Tort Claims Act" means the law set forth in State Government Article, §§12-101-12-110, Annotated Code of Maryland.

(10) "Office" means the Inmate Grievance Office.

(11) "Prejudice" means a finding that one or more procedural errors undermine confidence in the outcome of a proceeding; that is, but for the error or

errors there is a reasonable probability that the result would be different. There is always prejudice in the failure to abide by a directive or regulation establishing predisciplinary hearing time constraints.

(12) "Property grievance" means a grievance filed by an inmate that the inmate's personal property has been improperly withheld, lost, damaged, stolen, or destroyed through the negligence or other wrongful act or omission of an employee or official of the Division of Correction or Patuxent Institution.

(13) "Secretary" means the Secretary of Public Safety and Correctional Services.

(14) "Substantial evidence" means such relevant evidence as a reasonable mind could reasonably accept as adequate to support a conclusion without reassessing credibility or substituting judgment.

(15) "Treasurer" means the Maryland State Treasurer's Office.

.03 General Procedures.

A. A State or federal court may refer a complaint or grievance filed with it to the Office for review.

B. The Office shall receive for preliminary review any grievance submitted by a grievant.

C. If a grievance arises out of a disciplinary proceeding, the grievant shall exhaust all institutional

appeal procedures before the submission of the grievance to the Office.

D. To the extent that the administrative remedy procedure applies to a particular grievance, the grievant shall exhaust the administrative remedy procedure before the submission of the grievance to the Office.

E. The Executive Director, when conducting the initial review of a grievance, and the administrative law judge assigned by the Office of Administrative Hearings to consider the grievance, shall construe the grievance liberally in determining whether a cognizable issue is stated. When a grievance is based in whole or in part on an alleged violation of rights secured by the United States Constitution, a determination shall be made concerning compliance with applicable regulations, directives, and procedures in addition to the specific constitutional complaint.

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